

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES D. FRISBIE)	
Claimant)	
VS.)	
)	Docket Nos. 201,461 & 201,462
DELUXE SPECIALTIES)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE)	
Insurance Carrier)	

ORDER

Claimant requested review of the Award dated February 11, 1997, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on July 23, 1997.

APPEARANCES

James S. Oswalt of Hutchinson, Kansas, appeared for the claimant. Jess W. Arbuckle of Hutchinson, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award. In addition, at oral argument the parties stipulated that claimant's second accident, which was sustained on April 19, 1995, did not result in either permanent injury or permanent impairment.

ISSUES

The Administrative Law Judge awarded claimant permanent partial general disability benefits for a 43 percent work disability. Claimant requested the Appeals Board to review the Award. The following issues are now before the Appeals Board on this review:

- (1) What is the nature and extent of claimant's disability arising from the November 4, 1994, accident?
- (2) Is claimant entitled to reimbursement for medical mileage for therapy at the YMCA?
- (3) What benefits are due claimant for the April 19, 1995, accident?
- (4) What is claimant's average weekly wage for the various periods involved?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons explained below, the Award should be modified. In Docket No. 201,461 claimant is entitled to receive benefits for a 42 percent permanent partial general disability for the period between April 10, 1995, and April 19, 1995; for a 58 percent permanent partial general disability for the period between April 20, 1995, and October 18, 1996; and for a 55 percent permanent partial general disability for the period commencing October 19, 1996. In Docket No. 201,462, claimant is entitled to receive temporary total disability, temporary partial disability, and medical benefits.

The parties stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on both November 4, 1994, and April 19, 1995. The Division assigned Docket No. 201,461 to the November 1994 accident and Docket No. 201,462 to the April 1995 accident. At oral argument the parties stipulated the April 1995 accident did not cause either permanent injury or impairment.

- (1) What is the nature and extent of claimant's disability arising from the November 4, 1994, accident?

Claimant injured his low back on November 4, 1994. As a result of that accident claimant now has a 7 percent whole body permanent partial functional impairment due to an aggravation of degenerative disc disease. That conclusion is based upon the testimony of one of claimant's treating physicians, board-certified orthopedic surgeon Terrance C. Tisdale, M.D., who treated claimant for both the November 1994 and April 1995 accidents.

The Appeals Board finds Dr. Tisdale's testimony somewhat more persuasive regarding the functional impairment rating than that of board-certified orthopedic surgeon C. Reiff Brown, M.D., who saw claimant on only one occasion in April 1996 at his attorney's request.

After the November 1994 accident, claimant was off work for several months undergoing medical treatment. According to a wage statement admitted into evidence, when claimant returned to work with medical restrictions on April 10, 1995, claimant worked 30 hours the first week he returned and 40 hours the second week. During his second week back at work, claimant reinjured his back when he was helping lift a tank which weighed approximately 150 pounds. The parties stipulated claimant's average weekly wage for the April 1995 accident was \$332.40, excluding fringe benefits.

As a result of the April 19, 1995, accident, claimant was again taken off work. Claimant remained off work until October 1995 when he returned to work for the respondent working four and five hours per day. Claimant continued to work for respondent at those reduced hours until approximately July 27, 1996, when his doctor again took him off work due to progressively worsening back symptoms. Because of those increased symptoms, claimant has filed a third workers compensation claim with respondent and alleges a third new and distinct accident. At the time of the November 1996 regular hearing, claimant remained off work and was receiving medical treatment from Dr. Tisdale. When the doctor released claimant to return to work after the July 1996 back flare up, claimant was terminated as of October 18, 1996. The parties agree the July 1996 alleged accident is not before the Appeals Board on this review.

Because his is an "unscheduled" injury, claimant's entitlement to permanent partial disability benefits for the November 1994 accident is governed by K.S.A. 44-510e, which provides in pertinent part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury."

The Appeals Board finds claimant has a 65 percent task loss as a result of the November 1994 accident. That conclusion is based upon averaging the task loss

percentages provided by Drs. Tisdale and Brown when they considered the tasks claimant performed over the 15-year period before the date of accident. Dr. Tisdale indicated claimant could no longer perform 27 of 46, or 59 percent, of the tasks compiled by respondent's vocational rehabilitation expert, Karen Terrill. Dr. Brown testified claimant could not perform 71 percent of his former job tasks considering the list of tasks prepared by claimant's vocational expert, Jerry D. Hardin.

The Appeals Board finds there is a 19 percent difference in claimant's pre-injury average weekly wage of \$411.17 and his post-injury average weekly wage of \$332.40 for the period claimant returned to work for the respondent from April 10, 1995, through April 19, 1995. Therefore, claimant's permanent partial general disability for that period is 42 percent which is the average of the 65 percent task loss and 19 percent difference in wages.

For the period from April 20, 1995, through October 18, 1996, the Appeals Board finds the difference between claimant's pre-injury and post-injury average weekly wage is 50 percent. That percentage is derived by comparing the pre-injury average weekly wage of \$411.17 to \$207.50 which is the approximate weekly wage claimant was earning when he returned to work for respondent after the April 1995 accident working four to five hours per day as indicated by both vocational experts, Jerry D. Hardin and Karen Terrill. Therefore, for the period from April 20, 1995, through October 18, 1996, claimant's permanent partial general disability is 58 percent which is the average of claimant's 65 percent task loss and the 50 percent difference in wages.

When respondent terminated claimant's employment on October 18, 1996, and claimant lost his fringe benefits, those additional compensation items then became part of claimant's average weekly wage increasing it from \$411.17 to \$465.62. Therefore, as of October 19, 1996, the difference in claimant's pre- and post-injury average weekly wage decreases to 44 percent when comparing the pre-injury wage of \$465.62, which includes fringe benefits, to the post-injury wage of \$261.95 which also includes the stipulated \$54.45 in weekly fringe benefits. Therefore, for the period commencing October 19, 1996, claimant's permanent partial general disability is an average of the 65 percent task loss and 44 percent wage difference, or 55 percent.

Because claimant returned to work for respondent in April 1995 at a higher hourly rate than he was earning on the date of his first accident, respondent and its insurance carrier contend that claimant's permanent partial general disability should be limited to his functional impairment rating. Because respondent intended to work claimant 10 hours per day, 5 days per week, respondent and its insurance carrier now argue the Appeals Board should impute an average weekly wage based on a 50-hour work week for claimant's post-injury wage to determine the wage loss prong contained in K.S.A. 44-510e. Respondent and its insurance carrier request the Appeals Board to impute a post-injury wage for claimant despite the parties' stipulation that claimant's average weekly wage on the date of the second accident, April 19, 1995, was \$332.40.

The Appeals Board disagrees with the respondent's and its insurance carrier's analysis. First and foremost, the parties stipulated as to claimant's average weekly wage for the April 1995 accident. Because the stipulated wage was not 90 percent of claimant's pre-injury average weekly wage claimant is not limited to his functional impairment rating under K.S.A. 44-510e. The Appeals Board finds the parties' stipulation binding upon them for purposes of determining claimant's post-injury wage for the period April 10, 1995, through April 19, 1995. Secondly, as indicated by K.S.A. 44-510e, the wage loss prong of the formula for permanent partial general disability benefits is based upon wages actually being earned rather than an injured worker's alleged ability. This is not a situation where wages should be imputed pursuant to public policy considerations as was done in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

Respondent and its insurance carrier also contend claimant failed to properly account for all of his work tasks over the 15-year period preceding the November 1994 accident and, therefore, claimant has failed to prove his task loss. The Appeals Board disagrees. As a temporary worker for several years of the 15-year period before the November 1994 accident, claimant worked a number of different jobs for a number of different companies. However, the Appeals Board finds claimant did provide sufficient information to the vocational experts for them to compile a somewhat extensive and comprehensive list of tasks. Although he cannot recall the names of the 40-some employers he estimates he worked for as a temporary employee, he did discuss with both Mr. Hardin and Ms. Terrill the tasks he performed for those temporary employers. The vocational experts then formulated their list of tasks from the information claimant provided. Mr. Hardin identified approximately 51 specific tasks and Ms. Terrill identified approximately 46. When considering the entire record, the Appeals Board finds claimant has proven his task loss as required by K.S.A. 44-510e.

Finally, because claimant's preexisting degenerative disc disease was asymptomatic before November 1994, it did not disable or impair claimant in any manner. The Appeals Board has ruled on numerous occasions that unknown, asymptomatic, preexisting conditions do not constitute functional impairment which would qualify for the reduction provided in K.S.A. 44-501(c).

(2) Is claimant entitled to reimbursement for medical mileage for therapy at the YMCA?

Claimant contends he is entitled to reimbursement for mileage for physical therapy at the YMCA. The Administrative Law Judge denied reimbursement because claimant failed to prove such visits to the YMCA were prescribed or authorized. The Appeals Board agrees with that analysis and conclusion and adopts it as its own.

(3) What benefits are due claimant for the April 19, 1995, accident?

The parties stipulated respondent and its insurance carrier paid 27.31 weeks of temporary total disability benefits totaling \$7,983.94, temporary partial benefits totaling \$2,215.09, and provided medical benefits totaling \$6,605.93. The parties do not raise as an issue the propriety of those temporary disability and medical benefits which have been paid.

(4) What is claimant's average weekly wage for the various periods involved?

At the regular hearing held on November 6, 1996, the parties stipulated claimant's average weekly wage, excluding additional compensation items, was \$411.17 for the November 1994 accident and \$332.40 for the April 1995 accident. The parties also stipulated the value of claimant's additional compensation items was \$54.45. There appears no dispute that claimant remained in respondent's employ and received that additional compensation until his termination on October 18, 1996.

Based upon the above, claimant's average weekly wage for purposes of computation of his award in Docket No. 201,461 is \$411.17 for the period from November 4, 1994, through October 18, 1996, and then is increased to include the value of the additional compensation items to \$465.62. In Docket No. 201,462, claimant's average weekly wage is \$332.40 for the period from April 19, 1995, through October 18, 1996, and then is increased to \$386.85 for any benefits payable after that period.

As indicated above, the parties stipulated claimant sustained only temporary injury as a result of the April 19, 1995, accident. Although the injury was only temporary in nature, claimant is entitled to receive the temporary disability and medical benefits provided. Therefore, the Appeals Board finds claimant should be formally awarded those benefits in Docket No. 201,462.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated February 11, 1997, entered by Administrative Law Judge Bruce E. Moore should be, and hereby is, modified as follows:

Docket No. 201,461

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charles D. Frisbie, and against the respondent, Deluxe Specialties, and its insurance carrier, Liberty Mutual Insurance, for an accidental injury which occurred November 4, 1994, and based upon an average weekly wage of \$411.17 for 21.71 weeks of temporary total disability compensation at the rate of \$274.13 per week or \$5,951.36; for the period April 10, 1995 through April 19, 1995, 1.43 weeks at the rate of \$274.13 per week or \$392.01, for a 42% permanent partial general body impairment of function; for the period April 20, 1995,

through October 18, 1996, 78.29 weeks at the rate of \$274.13 per week or \$21,461.64, for a 58% permanent partial general body impairment of function; and commencing October 19, 1996, 144.84 weeks at the rate of \$310.43 per week or \$44,962.68, for a 55% permanent partial general body impairment of function, making a total award of \$72,767.69.

As of August 25, 1997, there is due and owing claimant 21.71 weeks of temporary total disability compensation at the rate of \$274.13 per week or \$5,951.36, followed by 1.43 weeks of permanent partial compensation at the rate of \$274.13 per week in the sum of \$392.01, followed by 78.29 weeks of permanent partial compensation at the rate of \$274.13 per week in the sum of \$21,461.64, followed by 45 weeks of permanent partial compensation at the rate of \$310.43 per week in the sum of \$13,969.35, for a total of \$41,774.36, which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$30,993.33 is to be paid for 99.84 weeks at the rate of \$310.43 per week, until fully paid or further order of the Director.

Docket No. 201,462

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Charles D. Frisbie, and against the respondent, Deluxe Specialties, and its insurance carrier, Liberty Mutual Insurance, for an accidental injury which occurred April 19, 1995, and based upon an average weekly wage of \$332.40 for 27.31 weeks of temporary total disability compensation at the rate of \$221.61 per week or \$6,052.17, and temporary partial disability benefits in the sum of \$2,215.09, making a total award of \$8,267.26 which is immediately payable, less the amounts previously paid. In addition, claimant is entitled to an award for the past medical expense incurred for treatment of this accidental injury.

The Appeals Board hereby adopts the remaining orders as set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James S. Oswalt, Hutchinson, KS
Jess W. Arbuckle, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director